BEST AVAILABLE COPY

QUESTIONS PRESENTED

Under the salary basis test of Section 541.118 of Title 29 of the *Code of Federal Regulations* interpreting the so-called "white-collar exemption" of the *Fair Labor Standards Act* at 29 U.S.C. §213(a)(1), employers whose disciplinary policies subject administrative, professional, and executive employees to unpaid disciplinary suspensions in increments of less than a week must pay overtime at time-and-a-half to all otherwise-exempt employees, not just those subject to such discipline.

1. ***Regulatory validity:*** Does 29 C.F.R. §541.118 validly apply to the public sector, or is the regulation arbitrary and capricious, contrary to sound public policy and basic principles of equality, fairness, and consistency, and contrary to express congressional intent that white-collar employees not be paid overtime?

2. ***Constitutionality:*** Does 29 C.F.R. §541.118 validly apply to the public sector, or does it violate the rights of States and their political subdivisions under the Tenth Amendment of the United States Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

PROLOGUE: "What's a public employer to do?" 3

SUMMARY OF ARGUMENT 13
I. The Regulation Is Invalid 13
II. The Regulation Is Unconstitutional 13

ARGUMENT 14
Introduction 14

I. THE JUDICIAL BRANCH OWES NO DEFERENCE TO AN EXECUTIVE BRANCH REGULATION THAT IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO THE EXPRESS INTENT OF CONGRESS; AND IS, IN FACT, COMPELLED BY THE ADMINISTRATIVE PROCEDURE ACT TO INVALIDATE IT 17

A. The regulation is completely at odds with principles of equality, consistency, and fairness, if not public accountability — particularly affecting the public sector — which the Department of Labor has failed to take into consideration since at least 1992 18

Page

B. The entire salary basis test, including its disciplinary component, is contrary to express congressional intent that white-collar employees not be paid overtime. 23

C. The salary basis test is arbitrary and capricious and contrary to sound public policy. 26

II. THE REGULATION VIOLATES STATES' RIGHTS UNDER THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. 28

CONCLUSION 30

APPENDIX OF NINTH CIRCUIT CASES CURRENTLY PENDING REGARDING THE VALIDITY OF 29 C.F.R. §541.118(a)(5) ix

TABLE OF AUTHORITIES

Caselaw

FEDERAL CASES — Page

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied* (1991), 498 U.S. 1068, 111 S.Ct. 785, 112 L.Ed.2d 848 ..... 4, 22

Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), *cert. granted* (U.S. No. 95-897 Jun. 24,1996) 2, 10, 14, 16

Balgowan v. New Jersey Dept. of Transportation, 84 F. 3d 656 (3d Cir., May 16, 1996); *op. withdrawn & vacated; rhr'g pet. granted,* 84. F. 3d 667 (July 9, 1996), *pending hr'g* 14, 16

Block v. Los Angeles Dept. of Water and Power, D.C. Case No. CV 91-5461-JGD(Tx), 9th Cir. U.S.C.A. Case No. 94-56135, consolidated with 94-56421 and 95-55345 ..... 2, ix

Carpenter v. City & County of Denver, 82 F. 3d 353 (10th Cir., Apr. 23, 1996), *rhr'g pet. denied* (May 21, 1996) *cert. pending* (U.S. No. 95-2088, filed 6-28-96) 14

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984) 18

Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) 4, 28, 29

FEDERAL CASES - Continued — Page

Harding v. City of Los Angeles, D.C. Case No. CV 94-00916-JGD(Tx), 9th Cir. U.S.C.A. Case No. 96-55286 ..... 2, ix

Hernandez v. City of Santa Ana, U.S.C.A. Case No. 93-56624, 1996 WL 454519 (9th Cir August 12, 1996) 16

Higuera v. City of Los Angeles and Dept. of Water and Power, D.C. Case No. CV 93-2527-JGD(Tx), 9th Cir. U.S.C.A. Case Nos. 96-55325, 96-55418, 96-55419, 96-55840, 96-55841, and 96-55844 ..... 2, ix

Hilbert v. District of Columbia, 23 F.3d 429 (D.C.Cir. 1994) 20

Huey v. Honeywell, 82 F.3d 327 (9th Cir. 1996) 26

McGuire v. City of Portland, Oregon, 91 F.3d 1293 (9th Cir., August 2, 1996), *action on rhr'g pet. deferred, pending Supreme Court's decision in Auer v. Robbins, Supra* 14, 16

Morsch v. City of Los Angeles, D.C. Case No. 91-00401-JGD(Tx), 9th Cir. U.S.C.A. Case No. 94-56701 ..... 2, ix

FEDERAL CASES - Continued Page

Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995) *rhr'g and en banc pet. denied* (July 12, 1995); *cert. pending sub nom. Wisconsin v. Mueller* (U.S. No. 95-586, filed October 10, 1995 14

Rusk v. Los Angeles Dept. of Water and Power D.C. Case No. CV 92-7316-JGD(Tx) 2

Service Employees International Union, Local 102 v. County of San Diego, 35 F. 3d 483 (9th Cir. 1994), *en banc and rhr'g denied, supp. op.* 60 F. 3d 1346 (9th Cir. 1995), *cert. denied,* __U.S.__, 133 L.Ed.2d 726, 116 S.Ct. 774 (Jan. 16, 1996), referred to throughout the brief as *"SEIU."* ..... *passim*

Spradling v. City of Tulsa, Oklahoma, __F.3d__, 1996 WL 518438 (10th Cir., Sept. 13, 1996) 14

Stanley v. City of Tracy, 9th Cir. U.S.C.A. Case No. 95-16242 ix

Yourman v. Dinkins, 84 F.3d 655 (2d Cir. 1996), *cert. pending sub. nom. Giuliani v. Yourman* (U.S. No. 96-152, filed 7-29-96) 14

STATE CASES

Skelly v. State Personnel Board, 15 Cal.3d 194, 124 Cal.Rptr. 14, 539 P.2d 774 (CA Supm. Ct. 1975) 19

Statutory Materials

FEDERAL CONSTITUTION

Tenth Amendment..... i, 4, 28, 29

FEDERAL STATUTES

5 U.S.C. §706, *"Administrative Procedure Act"* 13, 17
Fair Labor Standards Act," FLSA, or "the Act," ..... *passim*
29 U.S.C. §202 28
29 U.S.C. §207(a)(1) 24
29 U.S.C. §213(a)(1) ..... i, 23, 24
29 U.S.C. §216(b) 5
Title VII (42 U.S.C. §§2000(e), *et seq.* 7, 18

FEDERAL SESSION LAWS

Pub. L. 101-583, 104 Stat. 2871 (Nov. 15, 1990). 28
Pub. L. 99-150; 99 Stat. 790 (1985). 23
Pub. L. 93-259, 88 Stat. 55, 59-63 (1974) 4

STATE CONSTITUTION

California Constitution, Article XI, Section 10 20

STATE STATUTES

California Fair Employment and Housing Act, Government Code §§12900, *et seq.* 7

LOCAL ORDINANCES

Los Angeles City Administrative Code §§4.28 and 4.29 18

FEDERAL REGULATIONS — Page

5 C.F.R. §§551.203-206 27
Title 29, Code of Federal Regulations 21
Part 541 21
29 C.F.R. §541.5d ..... *passim*
29 C.F.R. §541.118 ..... *passim*
29 C.F.R. §541.118(a) 15, 20
29 C.F.R. §541.118(a)(1) 26
29 C.F.R. §541.118(a)(2) 15
29 C.F.R. §541.118(a)(5) ..... *passim*
29 C.F.R. §541.118(a)(1)-(6) 15, 24
29 C.F.R. §541.118(b) 15
29 C.F.R. §541.118(c) 15
29 C.F.R. §541.312 ..... 27, 28
29 C.F.R. §541.314 27

FEDERAL REGISTER
52 Fed.Reg. 2032 (1987) 22
57 Fed.Reg. 37666 ..... 12, 21
57 Fed.Reg. 37674 (August 19, 1992) 12, 21
61 Fed.Reg. 22339-22340 (May 13, 1996) 16, 22, 29

Other Materials

CONGRESSIONAL COMMITTEE HEARINGS
Serial No. 102-122, transcript pages 32-37
(September 16, 1992) 22, 29

FEDERAL RULES
Supreme Court Rule 37(4) 1
Ninth Circuit Rule 36-3 17

No. 95-897

In the

Supreme Court of the United States

October Term, 1996

FRANCIS BERNARD AUER, et al.,
Petitioners,

v.

DAVID A. ROBBINS, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF THE DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Department of Water and Power (DWP) is the largest municipally-owned utility in the nation, and the largest proprietary department of the City of Los Angeles, with independent power to sue and be sued in its own name. It therefore files this *amicus* brief without leave or consent, as permitted by Supreme Court Rule 37(4).

DWP currently has 9,367 employees, 735 of whom are classified as white-collar-exempt under the *Fair Labor Standards Act* ("FLSA"). DWP, like the cities of St. Louis and Los Angeles, like so many other public employers, has in place a discretionary disciplinary policy that permits, but

does not require, unpaid disciplinary suspensions in increments of less than a week for violations of rules not involving major safety violations. This disciplinary policy naturally applies to all employees, FLSA-exempt and non-exempt alike.

Of the 735 exempt employees at DWP, 262 have filed three separate lawsuits so far,[1] claiming overtime at time-and-a-half based on the disciplinary component of 29 C.F.R. §541.118, on the same theory as Petitioners before this Court. Two of those lawsuits are currently pending before the Ninth Circuit, and the third one is still in the District Court. The total liability exposure on these cases is calculated at close to ten million dollars for DWP alone.

After losing on liability below in *Higuera* and *Block*, DWP is appealing the regulatory and constitutional validity of 29 C.F.R. §541.118 as applied to the public sector. These statutory construction and constitutional validity arguments, heard by the Ninth Circuit in *Block* on March 6, 1996,[2] and partially briefed in *Higuera* as of October 1, 1996,[3] have not

[1] *Wayne Block, et al. v. Los Angeles Dept. of Water and Power*, D.C. Case No. CV 91-5461-JGD (Tx), 9th Cir. U.S.C.A. Case No. 94-56135, consolidated with 94-56421 and 95-55345; *Higuera vs. City of Los Angeles and Dept. of Water and Power*, CV 93-2527-JGD (Tx), U.S.C.A. Case Nos. 96-55325, 96-55418, 96-55419, 96-55840, 96-55841, and 96-55844; and *Rusk vs. Los Angeles Dept. of Water and Power*, CV 92-7316-JGD (Tx). Additionally, *Morsch v. City of Los Angeles*, No. CV 91-00401-JGD (Tx), U.S.C.A. No. 94-56701, and *Harding v. City of Los Angeles*, CV 94-00916-JGD (Tx), U.S.C.A. No. 96-55286 are currently pending in the Ninth Circuit against the City of Los Angeles, which is represented by different counsel.

[2] Per Ninth Circuit Order filed October 2, 1996, submission was vacated pending Supreme Court disposition in *Auer v. Robbins herein*..

[3] DWP's Opening Brief filed in the Ninth Circuit this date.

yet been ruled upon; they are repeated and expanded upon here in the hope that they will assist and persuade this Court to settle an issue of paramount public importance, involving not just the high financial stakes to the litigants, but the very core principles of equality, federalism, and separation of powers upon which this country was founded.

A final pronouncement from this Court on the more fundamental validity question — raised but not briefed by Petitioners—will not only be dispositive of the "subject to" and window of correction" questions presented, but also — and more importantly to the administration of justice — will help resolve countless public sector lawsuits pending regarding the salary test,[4] that are dividing so many federal courts across the land, and that are steadily making their way up to this Court.

PROLOGUE

"What's a public employer to do?"

The following scenario is partly fictional, but illustrative of the predicament of so many public sector employers in this and related litigation across the nation. Imagine the scene as the City Council Chambers of Anytown, U.S.A. Present are the Mayor, the City Attorney, and the Paymaster.

[4] According to 1995-1996 statistics provided by the Administrative Office of the U.S. Courts, 1,374 federal-question *FLSA* cases were pending in the U.S. District Courts as of March 31, 1996. It is uncertain how many of these involve public sector defendants or the disciplinary component.

Mayor: Madam City Attorney, would you please brief me on the status of this FLSA litigation, because I am not at all sure that any of it makes any sense to me.

City Attorney: You are not alone in your frustration, sir. It all started in 1974, when Congress made the FLSA applicable to public employers[5] and the Supreme Court held in 1985 that this did not violate States' rights under the Tenth Amendment of the U.S. Constitution.[6] In the seminal case of *Abshire v. County of Kern,*[7] the Ninth Circuit decided in 1990 that the theoretical possibility of deductions of a day or less pursuant to an express policy — even if no actual deductions had occurred — rendered a public employee non-salaried. This made virtually all public employers liable for overtime at time-and-a-half for its highest paid employees and, consequently, in 1992, the U.S. Department of Labor reversed its position on this issue, creating a regulatory exception for partial-day docking by public employers with public accountability ordinances requiring that leaves of a day or less be without pay,[8] and *Abshire* was, in effect, overruled in the public sector.

Creative lawyers for public employees soon found another theory to sue under, however, in the disciplinary

---

[5] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §88 Stat. 55, 59-63.

[6] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

[7] *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068, 111 S.C.t 785, 112 L.Ed.2d 848 (1991).

[8] 29 C.F.R. §541.5d.

component of the regulation,[9] which to this day the Secretary of Labor has failed to amend, despite repeated requests from the public sector for reasons similar to those that generated the public accountability exception for partial-day docking.

Mayor: Yes, and as I understand it, our current troubles arise because we have a disciplinary policy in place that subjects executive, managerial, and professional employees to discipline in increments of less than a week for infractions not involving major safety rules, and now all those otherwise FLSA-exempt employees, not just those actually disciplined, are claiming to be wage-earners under the regulation, and are demanding that we pay them overtime at time-and-a-half because of it, is that right?

City Attorney: Exactly. And that translates into —

Paymaster: — 200 employees with an average of 100 hours of accumulated overtime, making a minimum of $30/hr — or $45/hr at time-and-a-half — in sum, $900,000 in overtime that we would not otherwise pay.

City Attorney: Plus statutorily-imposed liquidated damages that double or treble that liability into the seven figures; and don't forget close to a hundred thousand dollars in plaintiffs' attorneys' fees, interest, and costs.[10] And that, of course, does not take into account our own legal fees and costs in defending these cases, which are not recoverable, even if we win.

Paymaster: I can only imagine the potential liability of a city the size of, say, Los Angeles, with 40,000 employees

---

[9] 29 C.F.R. §541.118(a)(5).

[10] Pursuant to 29 U.S.C. §216(b.

and all that accrued overtime due to floods, earthquakes, and riots in the last few years. . . ! Lawsuits like these could bankrupt many a city, county or even some states, especially in these times of tight fiscal budgets! And all because we are trying to be accountable to the public we serve, and have sensible disciplinary guidelines that are enforced consistently across the board!

Mayor: Now, wait a minute, you mean to tell me that the taxpayers of this City are going to be liable for that kind of money all because we have a disciplinary policy in place that in our case has never actually been imposed?!

Paymaster: That's right! I've done a thorough check of our payroll records, and there have been no actual disciplinary suspensions without pay imposed in our city upon employees classified as FLSA-exempt during the time period applicable to this litigation.

Mayor: Now that's crazy. That can't be right. I mean, not that no actual suspensions have been imposed, of course, but that we could be liable for this exorbitant amount of money because of it.

City Attorney: Well, that's part of what we are arguing in court. But there's more. Assume, for the sake of argument that one of these highly paid managers has been accused of uttering a racial slur and a second one is claimed to have made a sexually-offensive comment. Investigation reveals that the charges are substantiated, and that aggravating and mitigating circumstances are such that an oral reprimand is not enough, and more than a week is too harsh a penalty. Reassignment is neither warranted nor practical. The appropriate amount of discipline recommended by the disciplinary policy manual is a two-day suspension for the

first manager, and three days for the second one. The rules being violated do not involve major safety, so if we take the two and three days out of the managers' pay, we lose the white-collar exemption, not just for those two managers, mind you, but for every other FLSA-exempt employee in the City, as well. So we end up paying all of our employees overtime at time-and-a half. If what the managers had done, instead, was to smoke a cigarette or leave the engine on while pumping gas in our fleet garage, we could give them an unpaid disciplinary suspension for less than a week and not lose the exemption.

Mayor: Now that can't be. What else could we do but discipline them as recommended by the disciplinary guidelines for violations of Title VII[11] or the state anti-discrimination and harassment laws?[12] I know that these infractions don't involve life or death consequences, but they do impinge on basic human dignity! The U.S. Secretary of Labor, of all people, should be the last to suggest, through his regulations, that violations of other federal and state labor laws not involving major safety violations are somehow less important, and least of all should be encouraging their violation by penalizing employers — both public and private, for enforcing them fairly by meting out appropriate and consistent discipline to offending employees! Plus, doesn't this application of the salary test contradict the white-collar exemption? Because all of these exempt employees are unquestionably white-collar professional, managers, and executives under the "duties test," aren't they?

---

[11] 42 U.S.C. §§2000(e), *et seq.*

[12] *See, eg.,* California's *Fair Employment and Housing Act, Government Code* §12900, *et seq.*.

Paymaster: Yes, and most of them make between $60,000 and $100,000 a year; these are no sweatshop workers. . .!

Mayor: Nevertheless, under the regulations as they stand right now, and as they have been interpreted by the courts thus far, we have to give the offending managers in our hypothetical case an excessive unpaid suspension of more than a week in order to preserve the overtime exemption, but in doing so we violate our disciplinary guidelines?

City Attorney: Not to mention the City Charter, which not only empowers the City with the right to discipline a misbehaving employee, but also allows a monetary claim by anyone claiming to have been inappropriately disciplined. Plus it exposes us to disparate-treatment discrimination lawsuits regardless of the sex or race of the manager, since an employer is supposed to discipline consistently across the board, irrespective of the FLSA-exempt status of the employee. And although sex or race was not the reason behind our decision, some disgruntled employee will undoubtedly find some unscrupulous lawyer willing to bring a case in the hope of a settlement, and we will have no choice but to defend it regardless of its actual lack of factual or legal merit.

Mayor: It is inconceivable to me that these FLSA plaintiffs are actually asking the courts to uphold a regulation that forces their employer to discipline them more harshly than necessary, and discourages fair and appropriate discipline. That doesn't make any sense, particularly in the public sector. But then again, because of the disparate treatment problem, they probably figure that what we will do is not discipline them at all, and that suits them just fine.

Can they and the Secretary of Labor seriously be arguing that because they are executive, professional, and managerial employees they cannot be disciplined in increments of less than a week, or if they are, that we must pay them for overtime at time-and-a-half? Why can we discipline them only in full-week increments and dock them for a day or less without losing the exemption, yet if we discipline them for three days or for eleven days we have to pay them overtime at premium rate? This makes absolutely no sense whatsoever!

Paymaster: It also creates other problems in practice. Say we do give them a disciplinary suspension without pay for more than a week. Besides not being fair to the employees being disciplined because they only deserved a two or three-day suspension, it is also not fair to their subordinates, who on top of being offended by the racial slur or the sexist comment, probably have to pick up the slack for the offending manager during the unnecessary extra days that they are absent under the harsher suspension period required by the regulation. This can in turn result in extra overtime by these subordinates or coworkers, who, if wage earners get overtime at time-and-a-half, and if FLSA-exempt are going to claim it anyway. And remember, the rule exposes us to overtime claims at time-and-a-half not just for the suspended employee but for every other exempt employee on the payroll!

Mayor: And the public fisc is the one losing the most in the end, because it either pays overtime to the misbehaving employee, risks losing employee morale and public confidence if it does not discipline or disciplines without loss of pay, or if it disciplines excessively and pays unnecessary overtime to subordinates picking up the slack! So what's a public employer to do?

City Attorney: Well, we are vigorously defending these lawsuits in the federal courts across the nation, but at a very hefty legal cost. We are very hopeful, especially now that the Supreme Court has agreed to review the Eighth Circuit's decision in *Auer vs. Robbins* that the validity of the regulation will be decided on either statutory or constitutional principles, or both. We view this as the only way of putting an end to the endless barrage of public-sector FLSA litigation on this and other issues across the nation.

Paymaster: Yes, but how do you like the "about face" of the Department of Labor in its *amicus* brief opposing the granting of review by the Supreme Court in that case? In a desperate, last-minute effort to save the regulation from being invalidated, they are now saying that the regulation should stand because their newly-announced interpretation does not unduly burden the public sector.

Mayor: How's that?

City Attorney: Yes, in a surprise announcement in May of this year, in an *amicus* brief filed at the request of the Supreme Court in the *Auer* case, the Secretary of Labor, despite many previous requests for accommodation from numerous representatives of the public sector since at least 1992, finally announced to the courts that "subject to" means the actual imposition — as opposed to the theoretical possibility — of unpaid deductions, and that the white-collar exemption is not lost for "isolated deductions" or disciplinary suspensions imposed under "unusual circumstances," pursuant to discretionary disciplinary policies that permit but do not require them,[13] because, and contrary to their earlier

[13] *See* pp. 9-10 of Dep't of Labor's Brief opposing review in this case.

position, an employer may avail itself of the "window of correction" reprieve from the exemption in isolated cases, even where the deduction is clearly in violation of the regulation.[14]

Paymaster: Even assuming that the High Court were to pay any heed to this last-minute, self-serving interpretation, this of course creates more problems than it solves, doesn't it?

City Attorney: It sure does. If courts across the country have been handing down widely differing opinions interpreting "subject to" and the difference between the "docking" and the "disciplinary" components of the regulation, imagine how many more different, conflicting, "slippery slope" decisions we will now get on the meaning of "unusual circumstances" or what constitute "isolated" incidents of disciplinary suspension, or what is a reasonable period of time for an employer to avail itself of the window of correction, *etcetera*. Plus, even this interpretation of the regulation still treats similarly situated employers — and employees — differently, solely because of the number of employees that are being disciplined. And because of this, in effect, it reinforces the incentive under the regulation for employers to under- or over-discipline employees, which is unacceptable in the public sector due to the need to account to the public and other employees not just for the time that public servants are on the job, but also — and more importantly — for their good conduct while they are at work.

Mayor: So, again, I ask you, what's a public employer to do?

[14] Department of Labor's Brief opposing review in this case, at p.16.

City Attorney: Pray and hope that the Courts of Appeal or the Supreme Court will see the wisdom of the public sector arguments as the only way to put an end to all this confusing, costly, and time-consuming litigation once and for all, which is sure to continue into the future on other, yet untested theories under the regulation, such as deductions for witness or jury duty and military leave, that have started to come up in some recent cases. Our efforts to lobby Congress for a legislative amendment, or the Department of Labor for a regulatory exception, to the disciplinary component have certainly fallen on deaf ears.[15]

Mayor: I wish you luck, Madam City Attorney. Please keep me posted on a regular basis.

City Attorney: Thank you, sir. We will give it our best shot. I am confident that reason will ultimately prevail.

Mayor: In the meantime, Mr. Paymaster, pending further notice, please make sure that absolutely none of these highly-paid employees are disciplined in increments of less than a week under any circumstances — I can't believe I'm saying this! — even if that violates every principle of equality, public accountability and common sense that I can think of, and exposes us to all of these other problems that we have been discussing. The City Attorney will work with my Office in reducing this policy to writing and circulating it to all managers throughout the City for immediate implementation, pending further legal developments.

Paymaster: Will do, sir. Hopefully we will have a favorable decision soon.

---

[15] *See, eg., fns.* 21 and 22 at p. 27 of Petitioners' Brief, and 57 *Fed. Reg.* 37666, at 37674 (August 19 , 1992).

SUMMARY OF ARGUMENT

I. THE REGULATION IS INVALID

The judiciary owes no deference to an executive regulation that is arbitrary and capricious and contrary to express congressional intent; and is, in fact, compelled by the Administrative Procedure Act to invalidate it. The salary basis test is invalid for the following reasons:

A. Its disciplinary component is completely at odds with principles of equality, consistency and fairness — if not public accountability — particularly affecting the public sector, which the Department of Labor failed to take into consideration when it promulgated the regulation, thereafter, and to this day.

B. The entire salary basis test itself is contrary to express congressional intent that white-collar employees not be paid overtime, in that it is solely a creation of the Department of Labor who, by its piecemeal retreat from it — such as the disciplinary regulatory exception of 29 C.F.R. §541.118(a)(5) — implicitly concedes this contradiction.

C. The regulation as a whole is arbitrary and capricious and contrary to sound public policy because it makes no sense from anyone's perspective.

II. THE REGULATION IS UNCONSTITUTIONAL

29 C.F.R. §541.118 violates the rights of States and their political subdivisions to discipline its employees in that the political process to change the regulation to take into consideration unique public sector problems, has failed, despite many years of trying.

ARGUMENT

Introduction

With the possible exception of this case, every court considering the validity of the disciplinary component of the salary basis test to date has upheld it.[16] Yet none has apparently fully considered the true real-life implications and devastating consequences, best articulated in the *Prologue*, that public employers must grapple with in a good-faith attempt to comply with the regulation.

Only one court in the entire nation has had the courage to invalidate the *entire* salary basis test of 29 C.F.R. §541.118 as contrary to the intent of Congress regarding the public sector: the Ninth Circuit in *Service Employees International Union, Local 102 v. County of San Diego.*[17]

---

[16] *Mueller v. Reich,*, 54 F.3d 438 (7th Cir. 1995) *rehr'g. and en banc pet. denied; cert. pet. pending sub. nom. Wisconsin v. Mueller* (U.S. No. 95-586, filed Oct. 10, 1995); *Carpenter v. City & County of Denver, Colorado*, 82 F.3d 353 (10th Cir., Apr. 23, 1996), *rhr'g pet. denied, cert. pet. pending* (U.S. No. 95-2088, filed 6-28-96); *Balgowan v. New Jersey Dept. of Transportation*, 84 F. 3d 656 (3rd Cir., May 16, 1996), *op. withdrawn and vacated; rhr'g pet. granted*, 84 F.3d 667, pending hr'g; *Yourman v. Dinkins*, 84 F.3d 655 (2d Cir., May 31, 1996), *cert. pet. pending sub. nom. Giuliani v. Yourman* (U.S. No. 96-152, filed 7-29-96); *McGuire v. City of Portland, Oregon*, 91 F.3d 1293 (9th Cir., August 2, 1996), decision on *rhr'g pet. deferred, pending Supreme Court's decision in Auer v. Robbins herein; Spradling v. City of Tulsa, Oklahoma*, __F.3d__, 1996 WL 518438 (10th Cir., Sept. 13, 1996). Only the Eighth Circuit below "assume(d), without deciding that the regulation validly applies to public sector employees." *Auer*, 65 F.3d 702, at 710, fn.6.

[17] *Service Employees International Union, Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994), *en banc and rhr'g denied, supp. op.* 60 F. 3d 1346 (9th Cir. 1995), *cert. denied*, __U.S.__, 133 L.Ed.2d 726, 116 S.Ct. 774 (Jan. 16, 1996), hereinafter referred to as "*SEIU.*"

In so doing, that court based its decision on the Labor Department's own reasoning that most public employers could not comply with the regulation due to public accountability principles, thereby depriving them of the white-collar exemption intended by Congress to apply in the public sector, solely for that reason.

Although *SEIU* (decided in 1994 and supplemented in 1995) was a partial-day docking case, its express invalidation of *each and every* subsection of the salary basis test "in its entirety" is *not dictum,* because to reconcile the partial-day docking exception of 29 C.F.R. §541.5d with the personal-leave exception of 29 C.F.R. §541.118(a)(2) that precluded it only by negative implication, that court *had to* — under the separation of powers doctrine — invalidate the entire salary test, and not just the partial-day docking component before it:

> "Because the test's basic infirmity lies in its definition of what it means to be paid on a 'salary basis', *see* 29 C.F.R. §541.118(a), salvaging those contingent aspects of the regulation that qualify and provide exceptions, see 29 C.F.R. § 541.118(a)(1)-(6), (b), (c) is inappropriate. To do so would be tantamount to rulemaking, a power with which we are not invested."[18]

And it was this cornerstone principle of American government, rather than any possible misinterpretation of the scope of the Labor Department's non-enforcement policy — the Ninth Circuit believed that it applied to the entire salary test and the Labor Department claims it applied only to the partial-day docking rule — that propelled the largest circuit court in the nation to invalidate the entire salary test, and to

---

[18] *SEIU, supra*, at 1354 (emphasis added).

uphold only the validity of 29 C.F.R. §541.5d before it, a different regulation not at issue here.

SEIU therefore *expressly* invalidated the disciplinary component of §541.118(a)(5), specifically including that subsection in the text of its opinion. What is now left of the salary basis test, at least in the Ninth Circuit — 29 C.F.R. §541.5d — *does not mention the disciplinary component,* and the Department of Labor has not amended 29 C.F.R. §541.118 or come up with a new salary-basis regulation even after *SEIU* reiterated its total invalidity in its 1995 supplemental decision, and despite knowledge that the disciplinary component of the regulation was causing a great deal of problems in the public sector.[19]

McGuire vs. City of Portland, contra, supra at *fn.* 16, relied on *Balgowan, accord, supra* at *fn.* 16 — which has been withdrawn and vacated pending rehearing — and involved, in any event, evidence of at least *fifteen* actual disciplinary deductions from non-litigant employees in plaintiffs' classifications. Action on the rehearing petition in *Mcguire* has been deferred pending this Court's decision in *Auer*, and the case is therefore of questionable authority. And *Hernandez v. City of Santa Ana*, U.S.C.A. No. 93-56624, 1996 WL454519 (9th Cir. Aug. 12, 1996) cited at p.31

[19] *See, eg.*, 61 *Fed.Reg.* 23239-23240 (May 13, 1996), the most recent of frequent regulatory agendas issued by the Department of Labor in recent years proposing to review all aspects of the salary basis regulations, admitting that previous revisions of the regulations were "limited" in nature, and that the regulations are still in need of updating and clarification, particularly with regards to what constitutes a "salary basis," and acknowledging that in the public sector, in particular, recent court ruling have created "massive confusion and "progressive loss of control of the guiding interpretations under this exemption, . . . creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices."

fn. 26 of Petitioners' Brief, is an unpublished decision that may not be cited, except as allowed by Ninth Circuit Rule 36-3 not applicable here.

All cases upholding the validity of 29 C.F.R. §541.118(a)(5) seem to have rejected the reasoning of *SEIU* based on two misconceptions: (1) that the Department of Labor has not amended the salary basis test because it has duly *considered* public sector concerns and determined them to be unavailing; and (2) that public employers are at liberty to simply amend their disciplinary policies to comply with the regulation, or that they should have to. As developed below, none could be further from the truth.

I. THE JUDICIAL BRANCH OWES NO DEFERENCE TO AN EXECUTIVE BRANCH REGULATION THAT IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO THE EXPRESS INTENT OF CONGRESS; AND IS, IN FACT, COMPELLED BY THE ADMINISTRATIVE PROCEDURE ACT TO INVALIDATE IT.

Judicial review of arbitrary and capricious — or unconstitutional — federal agency regulations is mandated by 5 U.S.C. §706:

> "The reviewing court ***shall*** —
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity."[20]

[20] 5 U.S.C. §706 (emphasis added).

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984) is not to the contrary: "The Judiciary is the final authority on issues of statutory construction which are contrary to clear congressional intent." 467 U.S., at 843, *n.*9 (citations omitted). Based on this, *SEIU, supra,* at 1358-59, "declined the "wondrous and strange offer" to defer to the Labor Department's "failure to discharge its responsibilities under the law and to apply in a pending lawsuit a regulation that is manifestly inappropriate." This *amicus* asks *this* Court to do the same here.

A. The disciplinary component of the regulation is completely at odds with principles of equality, consistency, and fairness, if not public accountability — particularly affecting the public sector — which the Department of Labor has failed to take into consideration since at least 1992.

Public employers, like all employers, have an inherent right to discipline their employees. But they also have a duty — under laws such as Title VII, state anti-discrimination laws, and a myriad other social and public accountability statutes and ordinances — to do so consistently and fairly. The Department of Water and Power, for example, is liable by local ordinance, as is the City of Los Angeles, to anyone who claims to have been disciplined inappropriately.[21] This local ordinance is not taken into account by 29 C.F.R. §541.118(a)(5).

[21] *See, eg., Administrative Code of the City of Los Angeles,* § 4.28 and 4.29.

The disciplinary component of the regulation, in effect, compels disparate disciplinary treatment of employees solely because of their FLSA-exempt or non-exempt status. And like the partial-day docking component of the regulation previously invalidated by the Ninth Circuit, the disciplinary component is invalid as contrary to express congressional intent, because it deprives public employers of the white-collar exemption that Congress intended them to enjoy, *solely* because of a disciplinary policy that treats otherwise similarly-situated employees consistently and fairly. In short, it violates another basic principle upon which this country was founded: equality, in the sense of fair and consistent treatment under the law.

The "broad array" of disciplinary means available to public entities alluded to by previous court decisions is illusory and typically non-existent. Unlike in the private sector, where an offending employee is simply fired or very harshly disciplined, the need for progressive discipline in the public sector, starting with oral warnings, and progressing through reassignment and low-level disciplinary suspensions in increments of less than a week, is essential. Public sector employers must carefully navigate through constitutionally-mandated due process procedures[22] and equal protection limitations, state-law imposed duties to bargain collectively in good faith regarding changes in disciplinary guidelines, strict procedural and substantive limitations imposed by civil service rules adopted by local ordinances, and state

[22] *See, Skelly v. State Personnel Board*, 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774 (CA Supm. Ct. 1975), (holding that permanent California public sector employees protected by a statutory civil service scheme have a property interest in continued public employment that requires that they be given notice of the proposed disciplinary action, be apprised of the reasons therefor, and be provided a copy of the charges and an opportunity to respond).

constitutional prohibitions against retroactive payment of overtime,[23] that are simply not applicable in the private sector.

Moreover, deductions from pay are the most likely to get a deviant employee's attention, and the regulation irrationally prohibits only disciplinary deduction in *less than full week increments*, not just those less than a week, full-week deductions being allowed by the last sentence of 29 C.F.R. §541.118(a): "employee need not be paid for any workweek in which he performs no work."

But in the end, the overriding principle is equality: no public servant, no matter how high up, can or should be above a particular level of discipline. He or she — like every other public employee — has to be "subject to" discipline for misconduct, whether imposed or not.[24] Government cannot be consistently accountable otherwise. To suggest, as Petitioners do at p. 35 of their brief, that high-level employees can commit no wrong, or at least not merit discipline of a particular kind, is ludicrous; it is precisely at the highest levels of the American work force that wrongdoing needs to be addressed appropriately, because it is there that it can have its greatest impact, by way of example, on all other employees and the public at large, particularly in the public sector, where not just taxpayers' dollars, but the public's trust, are at stake. And a regulation that converts an administrator, an executive, or a professional into a wage earner *solely* because his employer reserves the

[23] *See, eg., California Constitution,* Article XI, Section 10.

[24] *Cf. Hilbert v. District of Columbia* 23 F.3d 429 (D.C. Cir. 1994), a badly divided opinion in which Judge Henderson, at p. 435 of her concurring and dissenting opinion, made a similar argument with regards to docking for partial-day absences.

right to discipline him for misconduct in a certain way, defies reason and should not be upheld under our system of laws.

And it defies reason because deductions from pay are not what make a public employee non-salaried: the Labor Department has already acknowledged this much by conceding in 29 C.F.R. §541.5d that a public employee's salary may be docked for partial-day absences and not lose exempt salaried status. To repeat the Ninth Circuit's wise pronouncement in *SEIU,* "the test's basic infirmity lies in what it means to be paid on a 'salary basis.' "[25] The salary test is totally unnecessary because the duties test already accounts for the essence of the white-collar exemption.

Within and without the Ninth Circuit, every court that has found the disciplinary component to be valid, has not considered these novel arguments, and is also apparently under the misapprehension that the Department of Labor has considered the problems raised by the disciplinary component of the regulation and decided to retain it without further exception for the public sector. This is simply not the case. At 57 *Fed.Reg.* 37666, specifically page 37674, the Labor Department replied to the numerous comments from various state, county, and local government representatives in August of 1992, that Section 541.118(a)(5) was not then open for comment; "however, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date."

And at congressional hearings held a month later before the House Subcommittee on Labor Standards regarding the retroactivity of 29 C.F.R §541.5d, numerous representatives of the public sector once again begged Congress and the

[25] *SEIU, supra,* at 1354.

Labor Department to address the disciplinary issue. Under the excuse that the issue was still not open for comment, the Labor Department adeptly evaded pointed congressional inquiry on the topic, and *declined to consider* the question, deferring consideration of the disciplinary component, and the public sector's special problems with it, to another day.[26] No public comments were, of course, received regarding the salary basis test in response to the 1985-1986 Department of Labor request for comments, because *Abshire* (1990) *supra*, had not yet come down, and no one had yet ideated the partial-day docking — let alone the disciplinary component — theories of recovery, and the 1985-1986 comment period had closed in 1987, as pointed out at page 30 of Petitioners' Brief.[27]

The dearth of any disciplinary violation cases currently being enforced by the Labor Department suggests at least an unofficial non-enforcement policy regarding this aspect of the salary basis regulation. And despite issuing frequent regulatory agendas reiterating the serious economic impact of the regulation, most recently on May 13, 1996,[28] the fact remains that the salary basis regulation has not been amended. This is precisely the same type of Executive Branch inaction of which the Ninth Circuit Court was so critical in its supplemental decision in *SEIU*, and which constituted the second, and most important, pillar of its reasoning.

---

[26] *See*, pages 32-37 of the official transcript of a hearing held in Washington, D.C., on September 16, 1996, before the House Subcommittee on Labor Standards, Committee on Education and Labor, U.S. House of Representatives, Serial No. 102-122.

[27] *See*, 52 *Fed.Reg.* 2032 (1987), cited at pp. 4 of Petitioners' Brief.

[28] 61 *Fed.Reg.* 23239-23240, fn. 19, *supra*.

The fact that 29 C.F.R. §541.5d is silent as to disciplinary suspensions, then, is not because the Department of Labor considered the issue and decided not to act, but because it has simply shirked its congressionally-mandated duty to reasonably interpret the Fair Labor Standards Act,[29] which under Section 6 of the 1985 public sector amendments, includes an express congressional directive to "promulgate such regulations as may be required to implement Congress' explicit accommodation to the special needs of state and local agencies.[30]

As the Ninth Circuit correctly noted in *SEIU*, the Labor Department promised rule-making regarding the partial-day docking component in January of 1987, and yet it was not until September of 1991 that 29 C.F.R. §541.5d finally came into being, and 1992 before it actually became final. Similarly, in September of 1992, the Department of Labor once again deferred consideration of public sector problems with the disciplinary component of the regulation to "a later day" that has yet to come: We are now in 1996 with no hope of a regulatory amendment in sight, many wishful regulatory agendas to that effect notwithstanding.

B. The entire salary basis test, including its disciplinary component, is contrary to express congressional intent that white-collar employees not be paid overtime.

---

[29] *See*, 29 U.S.C. §213(a)(1) *expressly* exempting "executive, administrative, and professional" employees from the overtime provisions of section 207 of the Fair Labor Standards Act "as such terms are defined and delimited from time to time by regulations of the Secretary."

[30] P.L. 99-150, §6; 99 Stat. 790, cited at p. 17 of Petitioners' Brief.

Section 213(a)(1) of the *Fair Labor Standards Act* expressly exempts "bona fide executive, administrative, or professional capacity" employees from the time-and-a-half provisions of Section 207(a)(1) of the Act.[31] As the Ninth Circuit noted in *SEIU*, Congress was silent with regards to the salary basis test when it enacted the *Fair Labor Standards Act* in 1938 and when it amended it in 1974 and 1985.[32] The clear congressional intent to be reasonably inferred from this fact is that Congress intended public sector employers to pay overtime at time-and-a-half, *but not to white-collar employees*, since Congress retained and meant to preserve the white-collar exemption in the public sector.[33]

The disciplinary problem arises only because the Labor Department found it necessary to carve out yet another regulatory exception to its ill-fated salary basis test. As stated in *SEIU*, the salary basis test is wholly a creation of the Department of Labor, not Congress. The very fact that the Labor Department has found it necessary to retreat piecemeal from this test with regulatory exceptions such as 29 C.F.R. §541.118(a)(2) through (5), all dealing with circumstances beyond the employer's control, obliterates the white-collar exemption expressly created and intended by Congress to apply in the public sector, and concedes conflict with it. This probably explains their inertia at further amending the regulation, despite awareness of serious problems with it in the public sector, first with the docking component, and then with the disciplinary aspect of the regulation: It is difficult to fix a test that makes no practical sense and contradicts an express congressional mandate. To do so would only

[31] *See* 29 U.S.C. §§213(a)(1) and 207(a)(1).

[32] *SEIU, supra*, at 1351.

[33] *Ibid.*.

concede the inevitable demise of an already infamous regulation.

As to the disciplinary component in particular, it is doubtful that the federal Congress would have intended to chill or interfere with as mundane and local a subject as an employer's inherent right, since time immemorial, to discipline its employees. That is a subject, which particularly in the public sector, is best left to local regulation. The employer is usually in the best position to determine what the most appropriate discipline is under the circumstances. A federal regulation that encourages excessive discipline — or discourages it at all for fear of costly overtime liability — encourages misconduct, is irrational, arbitrary and capricious, and cannot be upheld. Moreover, allowing the employer to impose minor disciplinary deductions in pay at its discretion is very important as a deterrent to possibly greater misconduct in the future. The infractions excluded from the regulatory exception are usually the sort of misconduct that the public — to which state and local governments are accountable — and private society at large, does not, and should not, want to allow going unpunished or punished improperly, precisely because they can be conducive to greater social ills, and are usually very disturbing (*eg.*, a first-time racial slur, a sexually-offensive comment, *etcetera*).

Congress did not intend, and from the express language of the Fair Labor Standards Act, it never actually put employers to the choice between disciplining its employees consistently, fairly, and appropriately, or paying them overtime at premium rates. Common sense and sound public policy would have precluded Congress, and hopefully the Secretary of Labor and this Court, from forcing employers to treat employees committing the same disciplinary violation differently *solely* because of their

FLSA-exempt status, which is the practical effect of the regulation in question. Discipline, to be respected and effective, has to be applied fairly and consistently to all employees.[34]

C. *The salary basis test is arbitrary and capricious and contrary to sound public policy.*

A basic tenet of our jurisprudence is that no one should profit from his own wrong. A regulation that rewards employee misconduct by requiring an employer to pay overtime to *all* employees at premium rates solely because the employer chooses to discipline an otherwise-exempt employee in a certain way — by imposing unpaid suspensions in increments of less than a week — violates this principle and makes no sense. As illustrated in the *Prologue*, lesser suspensions, such as oral warnings or reassignment, might not be meaningful or practical; greater suspensions might be abusive and unfair to the employee.

Subdivision (a)(1) of Section 541.118 states that salary status is lost for deductions from pay caused by the employer. By negative implication, the employer, which in this case is the public fisc, should not be penalized for deductions occasioned by employee misconduct. The old regulation, 29 C.F.R. §541.118, already partially recognizes this, by allowing deductions for absences due to serious safety violations. The distinction between serious safety violations and other types of disciplinary violations is also not reasonable for the reasons set forth in the *Prologue*.

---

[34] *Cf., eg., Huey v. Honeywell*, 82 F. 3d 327, 332 (9th Cir. 1996), recognizing that where an employer issues a disciplinary policy statement, in a manual or otherwise, it encourages employee reliance on it and the employer is not free to disregard it or to selectively apply it.

The entire salary basis test makes even less sense considering that the Labor Department has seen fit to dispense with the salary basis test entirely for other similarly-situated white-collar employees in both the public and the private sector, including its own: federal government employees;[35] lawyers, doctors, and teachers;[36] and computer programmers, if they make 6 1/2 times the minimum wage[37] — which incidentally, most plaintiffs in these cases exceed— are all exempted from the salary basis test. Regulations distinguishing among similarly situated white-collar employees — and particularly among Federal and state and local government employees — for no apparent reason, are inconsistent, irrational, and invalid under the Administrative Procedure Act. They also violate that basic principle of equality and fair treatment under the law.

The arbitrariness and capriciousness of the regulation reach their maximum height with the use of the term "subject to" that the Labor Department has now found necessary to retreat from and redefine in this case. It is a technical absurdity to impose the type of astronomical liability estimated at close to ten million dollars for this friend of the Court, and hundreds of millions, if not billions for the entire public sector in the United States—and ultimately the American taxpayer—solely because of the theoretical possibility of a disciplinary deduction that rarely, if ever, is imposed on any of these high-level executives, managers and professionals who, by virtue of their training and station in life are hopefully less inclined to commit these violations

---

[35] 5 C.F.R. §551.203-206.

[36] 29 C.F.R. §541.314.

[37] 29 C.F.R. §541.312.

anyhow. Nevertheless, that is what the regulations seem to say.

Ultimately, it cannot be ignored that these Plaintiffs are not the minimum-wage employees struggling to make a living whom Congress sought to protect in 1938.[38] They are, rather, America's highest paid public servants, making between $70,000 and $100,000 or more at DWP, and enjoying every protection of civil service systems and collective bargaining processes that, besides their talent and effort, have gotten them to their high station in life. They are hardly in need of the minimum-wage and time-and-a-half overtime protection expressly intended by Congress for the wage-earners at the lowest echelons of the labor force. The salary test is thus overinclusive and contrary to clear congressional intent.

II. THE REGULATION VIOLATES STATES' RIGHTS UNDER THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In *Garcia v. San Antonio Metropolitan Transit Authority*[39] this Court, by a bare majority with whom its current Chief Justice strongly dissented, held that the *Fair Labor Standards Act* did not violate States' rights under the Tenth Amendment of the United States Constitution, because "the political process ensures that laws that unduly burden the States will not be promulgated."

---

[38] *See* 29 U.S.C. §202. For more recent evidence of this intent, *see* P.L. 101-583, 104 Stat. 2871 (Nov. 15, 1990) Congressional directive to the Secretary of Labor to revise the salary basis regulations to exempt therefrom computer operators making more than 6 1/2 times the minimum wage, and the resulting regulation, 29 C.F.R. §541.312.

[39] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556, 105, S.Ct. 1005, 83 L.Ed. 2d 1016, 1037 (1985).

Just like it is not necessarily the FLSA that violates the Tenth Amendment, but rather the salary basis regulation, it is not as necessary to overrule *Garcia* — as much as the public sector would like that — as it is simply to apply it: the political process for addressing public sector concerns and resolving conflict regarding the salary basis test has failed since *Garcia* was decided.

As pointed out in footnotes 21 and 22 at page 27 of Petitioners' Brief, six times since 1991 bills have come before Congress proposing to amend the salary basis test in the public sector, and six times Congress has declined to act on them, despite having taken extensive testimony from public employers. Since the Department of Labor created the salary test, they can amend it or eliminate it without congressional amendment, which would be superfluous. The Department of Labor acknowledged this much at congressional hearings held in Washington on September 16, 1992 regarding the retroactivity of 29 C.F.R. §541.5d.[40]

But despite their congressionally mandated duty to interpret the FLSA and accommodate the public sector regarding it, the Department of Labor continues to this day to dump the task on already overburdened courts, through extended periods of regulatory inaction described above, and despite frequent regulatory agendas acknowledging the seriousness of the problem, such as 61 *Fed.Reg.* 23239-40. But nothing gets accomplished, despite recent exhortation by even the current White House administration, in an April 14, 1994 letter from Leon Panetta, addressed to the Secretary of Labor personally, asking that he act to remedy the problem.

---

[40] *See Congressional Subcommittee hearing transcripts,* pp. 35-36, *ibid., fn.* 26, *supra.*

The courts are doing their best to fill this regulatory void, unfortunately with very inconsistent results, and are ultimately — and perhaps unwittingly — literally passing the buck to the American taxpayer, who really has no political recourse on this issue, since public entities cannot vote, and the American public is not even aware of the problem or its seriousness — a problem that remains unresolved through both Republican and Democratic administrations.

CONCLUSION

The ratepayers of the Department of Water and Power of the City of Los Angeles therefore join Respondents in urging this Court to AFFIRM the decision of the Eighth Circuit below as to the interpretation of the term "subject to" and the application of the "window of correction," and implore this court of last resort to go further in the interests of justice, and invalidate the entire salary basis test, or at least its disciplinary component, based upon the common sense, statutory, and constitutional principles articulated here, or any others that this venerable Court may deem to have merit.

Respectfully submitted, this 10th day of October, 1996.

JAMES K. HAHN, City Attorney
for the City of Los Angeles
THOMAS C. HOKINSON, Chief
Assistant for Water and Power
OLGA HERNANDEZ GARAU
Deputy City Attorney and
Counsel of Record for
DEP'T OF WATER AND POWER
OF THE CITY OF LOS ANGELES

APPENDIX

APPENDIX OF NINTH CIRCUIT CASES CURRENTLY PENDING REGARDING THE VALIDITY OF 29 C.F.R. §541.118(a)(5)

Stanley v. City of Tracy, U.S.C.A. Case No. 95-16242 - oral arguments to be heard as scheduled on October 10, 1996.

Block v. Los Angeles Dept. of Water of Water & Power, U.S.C.A. Case No. 94-56135, consolidated with 94-56421 and 95-55345 - argued and submitted on March 6, 1996; submission vacated pending disposition of *Auer v. Robbins herein*, per Ninth Circuit Order filed October 2, 1996.

McGuire v. City of Portland, Oregon, U.S.C.A. Case No. 95-35391, 91 F.3d 1293 (9th Cir., August 2, 1996), *decision on rhr'g pet. deferred, pending Supreme Court's decision in Auer v. Robbins herein.*

Higuera v. City of Los Angeles and Dept. of Water and Power, U.S.C.A. Case Nos. 96-55325, 96-55418, 96-55419, 96-55840, 96-55841, and 96-55844 (DWP's Opening Brief filed October 1, 1996).

Harding v. City of Los Angeles, U.S.C.A. Case No. 96-55286 (being briefed).

Morsch v. City of Los Angeles, U.S.C.A. Case No. 94-56701 (being briefed).